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No. 04-163

In The
Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF
THE STATE OF HAWAII, ET AL.,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICI CURIAE OF CHARLES W. COUPE, ROBERT NIGEL RICHARDS, JOAN ELIZABETH COUPE, AND JOAN COUPE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does a regulation that fails to substantially advance legitimate state interests violate the Public Use requirement of the Fifth Amendment?

2. Does the substantially advance legitimate state interests criterion require scrutiny beyond minimum rationality?

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INTEREST OF AMICI CURIAE

Amici curiae Charles W. Coupe, Robert Nigel Richards, Joan Elizabeth Coupe, and Joan Coupe (Richards Family) respectfully submit this brief in accordance with Supreme Court Rule 37.[1]

The Richards Family has for generations owned private real property on the Big Island of Hawaii that now is being threatened with eminent domain to benefit private developers. The Richards Family filed a brief amici curiae in *Kelo v. City of New London*, No. 04-108 – which is scheduled for oral argument on the same day as the present case – explaining why the exercise of eminent domain in that case must substantially advance a legitimate state interest in order to satisfy the Public Use requirement of the Fifth Amendment. The Richards Family appears as amici in the present case because it represents the other half of that analysis: the "substantially advance" standard is a test of Public Use governing regulatory takings, and enforcing regulations that do not substantially advance a legitimate state interest is no different than allowing the government to abuse eminent domain power.

The Richards Family has borne the cost of preparing this brief because this case is of overwhelming importance to them and other property owners nationwide who suffer

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[1] The parties consented to the filing of amici curiae briefs, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amici curiae and counsel made a monetary contribution toward the preparation or submission of this brief.

takings of property by illegitimate exercises of government power, whether by eminent domain or by regulation.

Amici are also consumers of gasoline, and would be directly affected by Act 257, Haw. Rev. Stat. § 486H-10-4 (1997), the State's feckless attempt to lower consumer gas prices in Hawaii – a geographically distant market with few suppliers – by enacting a law capping the rent gas company lessors may charge their tenants for renting service stations.

As the courts below determined, if Act 257 is not invalidated, Hawaii consumers such as the Richards Family will pay the price by actually paying higher – not lower – prices at the pump. Amici respectfully urge this Court to affirm the courts below.

SUMMARY OF ARGUMENT

Regulations that fail to "substantially advance legitimate state interests" violate the Public Use requirement of the Fifth Amendment.

This conclusion results from an examination of the text of the Takings Clause itself, which contains two substantive limitations: (1) the taking must be for public use and (2) just compensation must be provided. Dual remedies give effect to these limitations: if an action is not for public use it is void, and if just compensation has not been provided, a property owner may compel payment. Review of what uses are "public," and what compensation is "just" is reserved for the courts.

The Fifth Amendment limits more than overt exercises of eminent domain. It is a settled element of this

Court's jurisprudence that a regulation – even one branded as "economic" – violates the Takings Clause if it (1) fails to substantially advance legitimate state interests, or (2) deprives an owner of beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). This regulatory takings standard's two-part foundation parallels the Takings Clause's dual requirements of Public Use and Just Compensation.

The "substantially advance" standard is a test of public use.

This brief sets forth why the "substantially advance" test is a Takings Clause standard and why heightened scrutiny should continue to be utilized to review regulatory actions alleged to violate the Fifth Amendment. Regulatory takings jurisprudence has long recognized the intermediate scrutiny of the substantially advance test requires more than the minimum rationality of due process.

This case presents the Court with the opportunity to clarify that the Public Use Clause limits all government actions impacting private property. Amici urge the Court to reaffirm that unless the government shows that a regulation substantially advances legitimate state interests, it is invalid as an act beyond the limited scope of government's power, in violation of the Takings Clause. The Court of Appeals should be affirmed.

ARGUMENT

I. "SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS" IS A TEST OF PUBLIC USE

A. The Fifth Amendment's Takings Clause Requires Public Use As Well As Just Compensation

The Takings Clause contains two distinct limitations on government action, requiring both "public use" and "just compensation" –

> . . . nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 232-33 (2003).

The Constitution contains neither a grant of eminent domain power, nor of "police power," only limitations on their exercise, with the proviso that any powers not expressly delegated to the national or state governments "are reserved . . . to the People." U.S. Const. amend. X. Consequently, this Court has long held that an action that takes property is beyond the power of government if it is not for public use. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (legislature has "no authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation."); *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937) (public use is an explicit limit on the power of government to take private property even if justly compensated).

A taking that is not for public use is therefore illegitimate and void. *See, e.g., Hawaii Hous. Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (action that fails public use

requirement serves no legitimate purpose of government and is void).

Determination of whether an action violates the Public Use Clause is a judicial function, and even if review is limited in scope, it is never absolutely immune from judicial scrutiny. *Id.* at 240 ("There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . ."); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles.").

Requiring public use insures that private property owners are not being unfairly forced to contribute their property to someone else's private use, that the public is benefitted, and that the government's purported need for the property is genuine before an individual's fundamental rights are disturbed.

Thus, the *Just Compensation* Clause alone may not, as the State's Questions Presented posit, authorize a court to invalidate regulation that takes property.[2] The Just Compensation Clause, however, as the text of the Fifth Amendment plainly reveals, is only half of the takings calculus. The *Public Use* Clause is the textual support for invalidation of regulatory actions that go "too far."

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[2] Petitioners frame the Questions Presented to suggest this case implicates only the Just Compensation Clause. Respondent, however, did not challenge Act 257 simply for failing to provide just compensation, it sought to invalidate the Act as violation of the *Takings* Clause.

B. Regulatory Takings Doctrine Recognizes The Fifth Amendment Restrains More Than Government's Overt Eminent Domain Power

All exercises of government power, and not only overt exercises of eminent domain, are limited by the public use and Just Compensation requirements. *See, e.g., Brown*, 538 U.S. at 232 (interest on lawyer's trust account regulatory scheme took property but takings satisfied public use requirement); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (Fifth Amendment requires *both* invalidation and just compensation remedies for police power regulations that violate Takings Clause); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) (regulation served legitimate public purpose).

"Regulatory taking" is an expression of the notion that government's power to rearrange private property rights operates on a continuum, and when it crosses a line – goes "too far" – either in rationale or effect – it matters not what label the legislature attaches to the exercise of power, what matters is the impact of such action on the fundamental right of property. *See First English*, 482 U.S. at 316 ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (Kohler Act enacted pursuant to state's police power went "too far"); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (imposition of a navigational servitude pursuant to the federal commerce power would be an invalid taking); *Babbitt v. Youpee*, 519 U.S. 234, 242-45 (1997) (striki..g down exercise of federal power to regulate Indian trust lands for violating Takings Clause); *Andrus v. Allard*, 444 U.S. 51, 64 & n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate").[3]

Thus, the Takings Clause is violated when the government restricts property to such an extent that it has effectively attempted to exercise eminent domain, the only differences being the government does not formally invoke the power of eminent domain and does not recognize an obligation to provide compensation.

A regulation fails this Court's two-part Takings Clause test when it either (1) does not substantially advance legitimate state interests, or (2) deprives the owner of all beneficial use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

C. Invalidation For Lack Of Public Use In Eminent Domain Is The Same Remedy For A Regulation That Fails To Substantially Advance Legitimate State Interests

Remedies available under the two tests for a taking by regulation are the same as those available to an owner

[3] Similar analysis is applied to other limitations on government power that protect fundamental rights, and these limitations do not depend on the power the government claims to be exercising. For example, police power regulations are reviewed with strict scrutiny if the regulation is alleged to impact free speech rights, even if the regulation is not affirmative government censorship. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (invalidating law restricting placement of signs within 500 feet of embassy because it was not narrowly tailored).

resisting a taking by eminent domain because the owner of private property facing eminent domain stands in the same position as the owner who asserts that regulation has the same effect. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) (from landowner's point of view overregulation is the same as appropriation).

If a taking is not for public use, it is invalid. *See, e.g., Midkiff*, 467 U.S. at 234-35 (property owner sought injunction and invalidation of state legislation alleged to be in violation of Public Use Clause); *Berman v. Parker*, 348 U.S. 26, 28 (1954) (property owner sought injunction and invalidation of federal legislation alleged to violate Public Use Clause).

Similarly, if a regulation does not substantially advance legitimate state interests, it is invalid and may be enjoined. *See, e.g., Nollan v. California Coastal Comm'n*, 482 U.S. 825, 828-29 (1987) (property owner sought writ of administrative mandamus to invalidate action for violation of Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (owner sought to compel issuance of permit without unconstitutional conditions attached).[4]

[4] The compensation remedies for eminent domain and regulatory takings are also the same. If property is taken by eminent domain but the compensation provided is not adequate, the owner is entitled to a judicial determination of the just amount. *See, e.g., Backus v. Fort Street Union Depot Co.*, 169 U.S. 557, 573 (1898) (Constitution requires full and adequate compensation); *United States v. 56.564 Acres of Land*, 441 U.S. 506, 513-14 (1979) (fair market value, not replacement cost, measures just compensation). If the owner is denied beneficial use of property by a regulation, she is entitled to just compensation in an action in inverse condemnation and the court establishes the amount due. *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting) ("The phrase 'inverse

(Continued on following page)

D. It Matters Little Whether Property Is Taken By Eminent Domain Or Regulation

Having the same textual foundation, eminent domain and regulatory takings jurisprudence cannot be logically or practically separated, particularly since from the property owner's perspective it matters little that in one instance the government is threatening to affirmatively confiscate his property by illegitimate means with compensation, while in the other the threatened confiscation is de facto rather than de jure and no compensation is provided. *See, e.g., Lucas*, 505 U.S. at 1017 (taking by overregulation is the same as appropriation); *Rukab v. City of Jacksonville*, 811 So.2d 727, 733 (Fla. Dist. Ct. App. 2002) ("We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context.

This Court has long recognized that regulatory takings are not different in effect from affirmative exercises of the eminent domain power when a property owner is either dispossessed of property for improper reasons, or left with little of value:

condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (property owner sought compensation alleging denial of beneficial use); *Lucas*, 505 U.S. at 1009 (owner conceded regulation was valid and sought only compensation); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 689 (1999) (property owner sought damages under 42 U.S.C. § 1983 for just compensation for deprivation of beneficial use).

> It would be a very curious and unsatisfactory result if in construing [the Takings Clause] it shall be held that if the government refrains from absolute conversion of real property to the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.

Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. 166, 176-78 (1871).

II. "SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS" REQUIRES SCRUTINY BEYOND MINIMUM RATIONALITY

A. Takings Clause Analysis Has Long Required More Than Minimum Rationality When Reviewing Regulation Impacting Property

Requiring that regulations "substantially advance legitimate state interests" plainly calls for more scrutiny than minimum rationality to determine whether regulation has gone "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> [O]ur opinions do not establish that these standards are the same as those applied to due process and equal protection claims.

Nollan, 482 U.S. at 834 n.3. *See also Dolan*, 512 U.S. at 391. Heightened scrutiny is required. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In *Penn Central*, the Court held that a regulation is a not taking when it serves "a substantial public purpose." *Id.* at 127

(citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The Court held it is:

> implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not *reasonably necessary to the effectuation of a substantial public purpose* . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Penn Central, 438 U.S. at 127 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring)). Thus, courts may examine the means used to accomplish important government ends, and the use of "substantial public purpose" rather than "legitimate state interest" is telling, for it demonstrates the textual connection between *Agins*' formulation of the standard and the Public Use Clause.[5]

This Court has continued to examine regulation under this standard for over three-quarters of a century. *First English*, 482 U.S. at 316 ("It has also been established doctrine at least since Justice Holmes' opinion for the Court in [*Mahon*] that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'") (quoting *Mahon*, 260 U.S. at 415). *See also* R.S. Radford, Of Course *a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a*

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[5] The Court sometimes uses the language "character of the government action" to examine the means used. *See Kaiser Aetna*, 444 U.S. at 175 (imposition of navigational servitude would violate Takings Clause) (quoting *Penn Central*, 438 U.S. at 124).

Regulatory Taking, 15 Fordham Env. L. Rev. 353 (2004) (detailing origins of substantially advance standard).

Subsequent decisions of this Court repeatedly confirmed the continuing validity of the standard, most recently in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002). Between *Penn Central* and *Tahoe*, the Court invoked the substantially advance test many times. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests'"); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("requirement that a regulation substantially advance legitimate public interests"); *Agins*, 447 U.S. at 260 (same).[6]

In *Nollan* and *Dolan*, the substantially advance standard provided the rule of decision, and the Court scrutinized the government's method even though the owner

[6] Unless Petitioners establish an irresistible reason to abandon the substantially advance test, the principle of *stare decisis* compels affirmance, as property owners have relied on the limited protection the test has offered for years. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (*stare decisis* promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis* concerns are "at their acme in cases involving property and contract rights." *State Oil*, 522 U.S. at 20 (citing *Payne*, 501 U.S. at 828). The repeated affirmations of the substantially advance standard by the Court mean something and should not be lightly brushed aside. *Cf. United States v. Gaudin*, 515 U.S. 506, 521 (1995) (*stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court").

retained some beneficial use of the property that was alleged to have been taken. *See Nollan*, 482 U.S. at 834 (when regulatory means did not have essential nexus to legitimate goals, there is a danger that government is leveraging police power in an "out-and-out plan of extortion"); *Dolan*, 512 U.S. at 387 (classifying the coastal commission's attempt to obtain the *Nollan* easement as "gimmickry").

Petitioners dismiss this long line of precedent as a "mistaken transposition of substantive due process doctrine into takings law," Brief for Petitioners at 23, insisting that courts cannot inquire whether regulation substantially advances legitimate state interests if the legislature labels its regulation "economic." According to Petitioners, once branded "economic," regulations are virtually immune from challenge, even where – as here – it is undisputed the regulation does not come close to advancing the goal the legislature established, and in fact has the opposite effect.

B. Regulation Is Not Insulated From Review Simply Because It Is Labeled "Economic"

A government action is not immune from public use review simply because it is labeled an "economic" regulation:

> But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights.
>
> . . .
>
> We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of

> Rights and the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Dolan, 512 U.S. at 392 (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); *New York v. Burger*, 482 U.S. 691 (1987); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980)).

It is dangerous to rely on legislative labels, rather than effect, because even clear expressions of the purpose of legislation are often ignored or recast after-the-fact by advocates advancing "plausible" rationales to support the regulation when challenged. *See, e.g., Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 855-56 (9th Cir. 2004) (during litigation the State attempted to change its reason for enacting Act 257 from lowering consumer gas prices to protecting dealers). Creative lawyering, not actual effect, would carry the day and completely swallow up the public use requirement and the regulatory takings doctrine. *Cf. Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.").

One clear example from the case at bar is the State's changing posture on Act 257: as the legislative history reveals, the rent control measure was very plainly enacted in order to lower consumer gas prices. The Hawaii Legislature expressly said so. However, when confronted with the fact that the Act would have the opposite effect, the State altered its supporting rationale, instead arguing it is designed to protect service station lessees from a gas

company oligopoly. *See, e.g.*, Brief for Petitioners at 1-2 ("This case involves a challenge to legislation enacted by the State of Hawaii to forestall the evils of oligopolistic concentration in the retail market for gasoline in this State.").

Now, the State is seeking to dispense addressing such inconsistencies altogether, asking the Court to insulate regulatory actions from any meaningful public use inquiry.

C. Dismissing The Substantially Advance Standard As A Due Process Test Writes Out The Public Use Requirement From The Fifth Amendment

In takings where the property owner alleges the regulation is beyond the power of government, the Public Use Clause calls for the heightened scrutiny of the substantially advance test. *See Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 396.

Petitioners assert that the validity of regulation may only be challenged under "substantive" due process standards. *See* Brief for Petitioners at 23-36. This assertion, however, virtually ignores the Public Use Clause and strikes it out of the Fifth Amendment when it is invoked as a limitation on the police power. As the Court reminded in *Dolan*, however, both the Takings Clause as well as the Due Process Clause restrict government power. *Dolan*, 512 U.S. at 384 n.5. Ever since the Court recognized that regulations could violate the Takings Clause, it has applied the substantially advance standard to review the public use of regulation. *Penn Central*, 438 U.S. at 127 (regulation is a "'taking' if not reasonably necessary to the effectuation of a substantial public purpose"). The Public Use Clause empowers courts to inquire into the

government's choice of illegitimate means to accomplish its goals. *Midkiff*, 467 U.S. at 240.

Regulation, like exercises of eminent domain, is subject to public use requirement. *See, e.g., Brown*, 538 U.S. at 232 (regulation satisfied public use requirement). The public use requirement cannot be ignored merely because it is regulation that is effecting the taking and not eminent domain.

Thus, the question in the case at bar is whether it would be a public use for the State to have attempted to exercise eminent domain to condemn the rent premium and turn it over to its lessees in order to reduce consumer gas prices. It is beyond doubt that if this question arose in the context of an eminent domain action, the court would be entitled to make that public use inquiry even if compensation were being provided.

D. Courts May Review The Means Used To Achieve Government's Goals

A strikingly similar scheme is being reviewed by this Court in *Kelo v. City of New London*, No. 04-108, the case set for oral argument on the same day as the case at bar.[7]

[7] Because the issues in *Kelo* and the present case are two halves of the same whole, the Richards Family also submitted an amici brief in *Kelo* explaining why exercises of eminent domain should be reviewed under the substantially advance test for public use. *See* Brief Amici Curiae of Robert Nigel Richards, *et al.* Supporting Petitioners, No. 04-108 (filed Dec. 3, 2004). Other amici agree. *See, e.g.*, Brief Amicus Curiae of Professors David L. Callies, *et al.* in Support of Petitioners, No.04-108 (filed Dec. 3, 2004); Brief of Cascade Policy Institute, *et al.*, as *Amici Curiae* in Support of Petitioners, No. 04-108 (filed Dec. 3, 2004).

In *Kelo*, the property owners are asserting that the government violates the Public Use Clause when it exercises eminent domain to take their property and turn it over to another private user supported only by promises the new owner will make more productive use of it. The public use advanced in that case by the government is that a better economy will result. However, the government has not established that seizing that Mrs. Kelo's home will better the economy.

This Court's public use jurisprudence holds that the requirement is "coterminous with the scope of the sovereign's police powers." *Midkiff*, 467 U.S. at 240. This formulation of public use is less instructive in regulatory takings, however, since "police power" is defined as any regulation not effecting a taking. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 70 (1986) ("[T]he outer limit of the police power has traditionally marked the line between non-compensable regulation and compensable takings of property. . . . Legitimately exercised, the police power requires no compensation.").

In undertaking this public use review, courts should not defer to the means used. *Nollan*, 483 U.S. at 834-35 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] they have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements."); *Dolan*, 512 U.S. at 396 (goals established by government were "commendable"). *See also Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 706 ("the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests"); *Hodel v. Irving*, 481 U.S. 704, 712 (1987) ("We agree with

the Government that encouraging the consolidation of Indian lands is a public purpose of high order.").

Nollan and *Dolan* represent two instances where the Court held that a regulation did not substantially advance a legitimate state interest and therefore violated the Takings Clause. In neither case, however, did the Court question the validity of the goal advanced by the government, only the means used to accomplish it. *See, e.g.*, *Dolan*, 512 U.S. at 396 ("The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, *but there are outer limits to how this may be done.*") (emphasis added).

Here, when the means the State chose to lower gas prices will not result in lower gas prices, but would instead raise them, an owner who is being forced to turn over its property to another for illegitimate reasons must be allowed the opportunity to challenge the regulation and not simply be limited to just compensation. The courts are obligated to scrutinize such actions for more than a minimum of rationality.

Public use criteria restricts regulation to public purposes. If the regulation impacts an individual's fundamental property rights, heightened scrutiny is merited to insure that the democratic process has not broken down and the government has not resorted to improper means to achieve proper goals. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (rent premium triggers heightened scrutiny of government's means); *Nollan*, 482 U.S. at 837 (when no compensation provided and regulation has no

nexus to legitimate government goal, danger exists that regulation is "an out-and-out plan of extortion").[8]

The State's gas station rent control measure is very similar to *Kelo*'s "economic development" taking, and both exercises of government power should be measured against the public use requirement under the same standard. Thus, in *Kelo*, heightened scrutiny will be useful to "smoke out" illegitimate criteria when the condemning authority is using the "suspect tool" of eminent domain

[8] Amici suggest that *Berman* requires first instance deference only to the government's advanced goals, because the means used in that case – condemnation of blighted property with payment of compensation – were substantially related to the interest of alleviating blight. However, even if *Berman* and *Midkiff* involve deference to the means used as well as the goal, that does not undercut the application of heightened scrutiny in regulatory takings. In eminent domain, the just compensation requirement acts as a limitation on the exercise of the power, making the government less likely to choose illegitimate means. Any unwarranted benefits to the government are negated by the compensation it must provide, theoretically resulting in a net gain of zero to both the government and the property owner. But where no compensation is provided, this dynamic vanishes, heightening the danger that the purpose advanced is pretextual, and the government has "forg[otten] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416. Those cases in which the Court invalidated regulation as a taking for failure to pay just compensation can best be understood as cases in which the public use requirement also was not satisfied because the legitimate government interest was not advanced substantially by a confiscation of property without just compensation. *See, e.g.*, *Loretto*, 458 U.S. at 424 (property owner sought injunctive relief for regulatory taking), *Kaiser Aetna*, 444 U.S. at 176 ("But this is not a case in which the Government recognizes any obligation whatever to condemn 'fast lands' and pay just compensation . . . "); *Nollan*, 482 U.S. at 841-42 (state is free to use power of eminent domain to accomplish the public purpose it attempted to advance by regulation).

supported only by promises of economic development. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

A similar rationale supports application of the substantially advance test in the present case. When it attempts to redefine property rights, a legislature not constrained by the just compensation obligation may not choose to accomplish its goal by means having the least profound impact on private property rights, but may target certain individuals unfairly to bear more than their share by effectively confiscating their property with no attendant public benefit. *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (state should take path that lessens burdens on constitutionally protected activity).

This case illustrates this danger. The State is taking Respondent's property and giving it to its lessees in an attempt to lower consumer gas prices. As the lower courts found, this goal will not be accomplished by the regulation. Thus, the "average reciprocity of advantage" rationale that supports the uncompensated exercise of police power does not exist. Chevron is deprived of its property, the lessees are the only parties enriched, and the public sees no benefit at all, and may even be worse off. A regulation loses its public character when it is patently unable to accomplish its purported goal.

E. "Substantive" Due Process Protects Different Interests Than The Takings Clause, And Reaffirmation Of The Substantially Advance Standard Is Not A Return To *Lochner*

Dismissing the substantially advance standard as an orphaned due process test also ignores the different

interests protected by the Takings Clause and the Due Process Clause.

"Substantive" due process protects the right to avoid regulation that intrudes upon extra-textual "liberty" interests. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 516-17 (1961) (Douglas, J., dissenting) (in addition to fair procedures, due process includes the right to travel, the right to marry, and the right to privacy). The Takings Clause protects private property from de jure or de facto appropriation, and requires that any taking be for public use and that compensation is provided. This does not call for a guarantee of "economic liberty" protected under the now discredited *Lochner v. New York*, 198 U.S. 45 (1905) and its progeny. A regulatory takings plaintiff must allege and prove that she has a legitimate claim of entitlement to property, *see Board of Regents v. Roth*, 408 U.S. 564 (1972), not merely that she has some unrealized economic expectations that have been thwarted by regulation.

In the eighty-plus years of its existence, judicial scrutiny under the substantially advance standard has not resulted in unwarranted intrusion into legislative functions, or presaged a return to *Lochner*'s theory of economic liberty.

First, heightened scrutiny, as *Nollan* and *Dolan* make clear, applies to the means used by government to achieve its goals. The Court has never hesitated to review police power regulations that impact fundamental constitutional rights with heightened scrutiny. *See, e.g., Ladue v. Gilleo*, 512 U.S. 43 (1994) (invalidating under the First Amendment municipal regulation of residential signs as not closely tailored). Property is a fundamental right. *See Lynch v. Household Finance Corp.*, 504 U.S. 538,

552 (1972) ("The dichotomy between personal liberties and property rights is a false one."); *Dolan*, 512 U.S. at 392 (all fundamental rights deserve constitutional scrutiny).

Second, some regulations will pass even *strict* scrutiny, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact"), so there is no reason to suspect that the *intermediate* substantially advance level of scrutiny will result in wholesale invalidation of legislation. For example, the regulatory schemes in *Berman* and *Midkiff* would pass substantially advance scrutiny.[5]

Third, the Court addressed the concern of judicial "second-guessing" in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999). In that case, a jury found the government's repeated permit denials did not substantially advance a legitimate state interest. *Id.* at 703-04. The city asserted that jury instructions should not have permitted the jury to review its land use determinations. *Id.* at 704 ("[T]he city maintains that the Court of Appeals adopted a legal standard for regulatory takings

[5] The government actions in *Berman* and *Midkiff* pass intermediate scrutiny, because the means chosen by the government – eminent domain with the payment of just compensation – were substantially related to the advanced goals. In *Berman*, the regulation was designed to improve severely blighted property in Washington, D.C. *Berman*, 348 U.S. at 30. In *Midkiff*, the Hawaii Land Reform Act was enacted to remedy the ills perceived to be caused by concentrated land ownership. *Midkiff*, 467 U.S. at 232-33, 241-42. The Court did not question that eliminating blight and the breakup of land oligopolies are legitimate government goals. The means used in the cases substantially advanced those ends: taking blighted property by eminent domain and putting it into the hands of a redeveloper alleviated the blight; exercising eminent domain to vest individual owners with title diversified ownership.

liability that allows juries to second-guess public land-use policy."). The Court noted first that the jury charge was "consistent with our previous general discussions of regulatory takings liability," *id.*, then rejected the city's argument that the substantially advance standard opened up legislative determinations to judicial scrutiny.

CONCLUSION

Textually rooted in the Public Use Clause, the "substantially advance" takings requirement cannot be lightly brushed aside or simply subsumed within "substantive" due process analysis. The Fifth Amendment contains independent limitations on government power, which requires that regulations satisfy public use standards, not simply that the government provide compensation if the regulation impacts property's value.

In the end this case, like *Kelo*, is reduced to this vital fact: the Constitution contains the *Public Use* Clause, not just the Just Compensation Clause.

The Court of Appeals should be affirmed.

Respectfully submitted,

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